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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **ARB.P. 1068/2023**

M/S. BREAKTHROUGH CONCEPTS

..... Petitioner

Through: Mr.Ansh Singh Luthra,
Mr.Harmanpreet Singh Kohli,
Ms.Nikhar Luthra and Mr.Madhav
Kumar, advts.

versus

M/S. ATRIX GROUP OF RESTAURANTS & ANR.

..... Respondents

Through: Mr.Gaurav Prakash Pathak, adv.

CORAM:

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

ORDER
22.02.2024

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The present petition has been filed under Section 11 (5) & (6) of the Arbitration and Conciliation Act, 1996 seeking the appointment of an Arbitral Tribunal comprising of a Sole Arbitrator to adjudicate the disputes *inter se* the parties.

A franchise agreement dated 26.05.2017 has been entered into between M/s Kaur Cookies Pvt. Ltd. and Respondent No.1 through Respondent No. 2. M/s Kaur Cookies Pvt. Ltd. was subsequently transferred to M/s. Breakthrough Concepts i.e. the present petitioner by way of deed of assignment. This fact has not been disputed by the respondents. The petitioner's case is that the respondents approached the petitioner to modify the rate of royalty and management fee. The petitioner keeping in view the



COVID-19 Pandemic reduced the Royalty and Management Fee to Rs.1 lakh per month. However, even thereafter the respondents defaulted in making timely payment of the royalty and management fee to the petitioner. In February 2021 there was a due of Rs.11,43,378.33/-. The petitioner reminded and requested respondent No. 1 to make the complete payment of their outstanding liability. However, the respondents did not pay any heed to the request of the petitioner. The petitioner stated that thereafter they sent four legal notices i.e. dated 20.07.2022, 01.09.2022, 31.05.2023, and 07.07.2023. Thereafter, the arbitration clause was also invoked vide notice dated 31.05.2023.

The respondents in their reply have predominantly taken the objection that the procedural requirement of the arbitration clause has not been complied with by the petitioner and therefore the present petition is premature. Learned counsel for the respondents submits that the petitioner had not taken any step for the negotiations and therefore the petition being premature is liable to be dismissed.

The perusal of the petition makes it clear that the petitioner had consistently been sending demand notices to the respondents which remained un-responded. The service of the four demand notices before the filing of the petition makes it clear that the petitioner had made an effort for the settlement of the dispute before coming to court.

The term '*negotiation*' has to be read and understood in the practical sense. The parties can negotiate by way of communication between them. However, the communication has to be both ways. If one does not respond to the other, the negotiation cannot take place. The negotiation requires the participation of both parties. The respondents herein have failed to



participate in the same. The jurisdiction of the court while making the reference is very limited. The scope of jurisdiction of the court under section 11(5) & (6) of the Arbitration and Conciliation Act, 1996 is very limited to examining whether an arbitration agreement exists between the parties. Reliance can be placed on *M/S Duro Felguera, S.A. vs Gangavaram Port Limited* (2017) 9 SCC 729.

In the present case, admittedly there is an agreement between the parties and there is also an arbitrable dispute. I consider that the matter is required to be referred to arbitration.

In the facts and circumstances of the case, the present petition is disposed of with the following directions:

- i) The disputes between the parties under the said agreement are referred to the arbitral tribunal.
- ii) The Delhi International Arbitration Centre is requested to appoint an Arbitrator to adjudicate the disputes between the parties.
- iii) The arbitration will be held under the aegis of the Delhi International Arbitration Centre, Delhi High Court, Sher Shah Road, New Delhi hereinafter, referred to as the 'DIAC'). The remuneration of the learned Arbitrator shall be in terms of fee rules of the DIAC schedule or as the parties may agree.
- iv) The learned Arbitrator is requested to furnish a declaration in terms of Section 12 of the Act prior to entering into the reference.
- v) It is made clear that all the rights and contentions of the parties, including as to the arbitrability of any of the claims, any other preliminary objection, as well as claims on merits of the dispute of either of the parties, are left open for adjudication by the learned arbitrator.



vi) The parties shall approach the learned arbitrator within two weeks from today.

DINESH KUMAR SHARMA, J

FEBRUARY 22, 2024/rb..